STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

DELORES MARIE DERROR,

Defendant-Appellant.
_____/

Supreme Court No. 129269

Court of Appeals No. 258346

Lower Court No. 04-0344-FY-1

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DEFENDANT-APPELLEE'S BRIEF ON APPEAL (ORAL ARGUMENT REQUESTED)

PROOF OF SERVICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, COURT RULES

STATEMENT OF JURISDICTION

Defendant-Appellee agrees with Plaintiff-Appellant's statement of the jurisdiction of this Court to review the instant case.

STATEMENT OF QUESTIONS PRESENTED

I. IS CARBOXY THC, A METABOLITE OF MARIJUANA WITH NO PHARMACOLOGIC EFFECTS, A SCHEDULE 1 CONTROLLED SUBSTANCE?

Trial Court answers, “No.”.

Court of Appeals answers, "No".

Plaintiff-Appellant answers, “Yes”.

Defendant-Appellee answers, "No".

II. CAN MCL 257.625(4), (5) AND (8) BE INTERPRETED TO CREATE STRICT LIABILITY CRIMES WITHOUT VIOLATING DEFENDANTS' CONSTITUTIONAL RIGHT TO DUE PROCESS?

Court of Appeals made no answer.

Plaintiff-Appellant answers, "Yes".

Defendant-Appellant answers, "No".

COUNTER-STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

This Court granted the prosecution's application for leave to appeal the Court of Appeals' opinion affirming the trial court's decision that 11-COOH-THC or carboxy THC is not a schedule 1 controlled substance. (278a, 259a-268a) This Court also allowed the prosecutor to add a new issue on appeal, specifically whether "the prosecutor must prove beyond a reasonable doubt that defendant knew the ingestion of the controlled substance may cause intoxication." (278a)

This appeal arises from an interlocutory order in the prosecution of Defendant Delores Derror for driving under the influence of drugs causing death or serious injury, in violation of MCL 257.625(4). Ms. Derror was involved in an accident on January 11, 2004, on M-72 in "snowy and slushy" road conditions. (12a-13a) Ms. Derror's truck collided with a car being driven by Randy Elkins after the trailer Ms. Derror was pulling started swerving and pushed her truck into the other lane. (13a-14a). One passenger in the car, Angela Gierson, died as a result of the accident, and Mr. Elkins' three daughters suffered serious injuries. (8a, 11a-12a) The accident occurred at approximately 6 p.m. (10a)

At the hospital after the accident, the police searched the purses of the women who had been involved in the accident. (30a) The police found Ms. Derror's wallet, with her driver's license in it. (31a) Then they found "like a lipstick container, kind of an exotic design on it" that they though might contain some contraband. (32a) The police then searched the container, without first obtaining consent or a warrant, and found "five marijuana joint roaches in there." (32a) Confronted with these joints, Ms. Derror admitted that she had smoked a marijuana joint at about 2 p.m., approximately four hours before the accident. (34a, 46a)

A search warrant was obtained to allow for the performance of blood tests on Ms. Derror. Neither of the tests showed the presence of any substance specifically identified as a controlled

substance other than medications administered at the hospital. (55a-56a) Indeed, as the State acknowledged below, "this is not an impairment case." (23b; *id* at 24b ("testimony regarding impairment is not relevant")) Test results did show, however, that Ms. Derror had 31 nanograms of carboxy THC in her blood at eleven p.m., down from 38 nanograms of carboxy THC in her blood at eight p.m. (55a, 60a)

Carboxy THC is a metabolite of THC, the active ingredient in marijuana. (106a, 193a) Carboxy THC is generated in the body by oxidization of the parent THC molecule, and the only way for it to arise in blood is through prior ingestion of THC. (106a, 193a)

The trial court held a *Daubert* hearing on the issue of whether 11-COOH-THC is a schedule 1 controlled substance. "It is undisputed that the metabolite 11-COOH-THC does not have the potential to be abused and has no pharmacological effect or medicinal value." (246a; *see also* 111a, 271a) In other words, carboxy THC has no euphoric, hallucinogenic or depressant effect. (248a) How long carboxy THC is detectible in the bloodstream depends on the sensitivity of the testing, but even according to the prosecution's expert it can remain at detectible levels in the blood for up to six days, and in urine it can remain for several weeks. (135a ("It will show up in the urine, yes, for some time after you smoking, it can be several weeks"); 135a-136a ("On some [blood] tests you can see it for a couple days"); *Id.* ("Chronic users you can see Carboxy THC up to six days according to scientific literature? If you use a test – we don't see anything that low, our limited to one nanogram")) Both experts also agreed that the effects of marijuana last no longer than 24 hours (and perhaps less) and that the active ingredient, THC, would be below 5 nanograms within two hours of use. (181a-182a, 194a)

The prosecution's expert, Michelle Glinn from the Michigan State Police crime lab testified that she believed carboxy THC was a derivative, as that term is used in MCL

333.7212(1)(d). (105a, 193a) "As a chemist the derivative is a chemical modification of a parent compound. The derivative reacts, where you take a parent compound, parent drug, react it with something else, produce something else." (107a) Derivativatization is, for purposes of science, "to react a compound with something else to modify that compound." (141a) Derivatization occurs in a test tube; metabolizing occurs inside the body. (142a-143a) She believes that the metabolite is included not just because of the word derivative, but because of the phrase in that subsection which was "derivatives and compounds with similar chemical structure." (131a)

In contrast, the defense expert Dr. Daniel McCoy, testified that carboxy THC should not be considered to be a schedule 1 drug because metabolites are not derivatives in the way that term is used in the scientific field. (158a-160a, 187a) In his decades of experience, Dr. McCoy in the field, Dr. McCoy has never seen the term derivative used to refer to metabolites. (187a) Derivative applies only to a substance created in a test tube (or outside of the body). To use the term derivative in the way Dr. Glinn did, *everything* would be a derivative of marijuana including carbon dioxide. (161a, 183a) The defense further produced evidence that carboxy THC could be purchased without a federal DEA license to purchase a Schedule 1 substance. (173a-175a; 1b) Although Dr. Glinn believed the reason no license was required was because the product was in a methanol solution, Dr. McCoy did not think this was the reason. (176a)

In its September 27, 2004, ruling, the trial court found that carboxy THC is not a schedule 1 controlled substance. (247a) The trial court stated that the issue turned on legislative intent. Citing *People v Riddle*, 65 Mich App 433 (1976), which held that even though MCL 333.7106 specifically refers only to Cannabis sativa L, the statutory definition of marijuana included *all* species of marijuana. (246a) "The intent of the legislature was to control all types

of marihuana with a euphoric effect." (*Id.*) The trial court further observed that because another metabolite of marijuana is carbon dioxide, the legislature could not have intended that the presence of carbon dioxide in the body "to be either criminal or evidence of a crime." (*Id.*)

The Court of Appeals affirmed. (259a-268a) The court first rejected the prosecutor's assertion in this case that carboxy THC is contained within the definition of MCL 333.7212(1)(d) because that section applies only to synthetic versions of marijuana. (262a-263a) The court also rejected the prosecutor's position in *Kurts* that carboxy THC is included within the definition of marijuana contained in MCL 333.7106(3). (263a) The court rejected this argument because the Legislature has indicated in other ways that metabolite is not included in that definition. (*Id.*) Moreover, inclusion of metabolite in the definition of a Schedule 1 substance does not comport with the purpose of the public health code. (264a-265a).

ARGUMENT

I. CARBOXY THC, A METABOLITE OF MARIJUANA WITH NO PHARMACOLOGIC EFFECTS, IS NOT A SCHEDULE 1 CONTROLLED SUBSTANCE

A. Standard Of Review/Issue Preservation

Defendant accepts the People's statement of the standard of review and issue preservation.

B. The Word Metabolite Does Not Appear Anywhere In The Controlled Substance Act

The lower courts correctly concluded that 11-COOH-THC, carboxy THC, is not a Schedule 1 controlled substance under the clear language of the statute. Carboxy THC is a metabolite produced when the body processes THC. It has absolutely no pharmacologic effects: nobody has ever, or could ever, get high from smoking or otherwise using carboxy THC. In contrast, a Schedule 1 controlled substance is defined as one that "has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." MCL 333.7211. Carboxy THC is not specifically listed as a Schedule 1 controlled substance, and no federal or state court has ever held it to be one.

Not only is carboxy THC not listed as a controlled substance, the word metabolite also does not appear on the list of Schedule 1 substances in MCL 333.7212, or in any of the preceding definitions. The only place the word appears in the MCL is in the Probate Code. In MCL 722.623a, the Legislature created a reporting requirement whenever a newborn has "a controlled substance, or a metabolite of a controlled substance" in his or her body. "The Legislature is presumed to be aware of all existing statutes when enacting new laws." *Nemeth v Abonmarche Development, Inc,* 457 Mich 16 (1998). As the Court of Appeals correctly noted, "[a]s the

Legislature expressly included metabolites in another statute, we must assume that it intended to expressly *exclude* the regulation of these substances in the public health code." (263a-264a citing *Farrington v Total Petroleum, Inc*, 442 Mich 201 (1993))

The prosecutors do not address this part of the Court of Appeals decision in the briefs in either *Derror* or *Kurts*, perhaps because this fact cannot be squared with their argument that under the "plain language" of the public safety laws marijuana metabolites are a controlled substance. Curiously, the People cannot agree on which statutory provision contains this "plain language." In *Derror,* the People assert that MCL 333.7212(1)(d) governs. In *Kurts*, the People eschew MCL 333.7212 in no uncertain terms ("of course this statute doesn't answer the main question directly," AB at 13 fn 4), in favor of MCL 333.7106.[1] As discussed below, neither statute includes carboxy THC as a controlled substance. The People are simply trying to stretch the language of the controlled substance statute beyond recognition.

C. MCL 333.7212(1)(d) And MCL 333.7212(1)(e) Apply Only To Synthetic Drugs. The Prosecutor's Argument Is Contrary To MCL 333.7121, Which Requires That Every Provision Of The Act Be Construed In A Manner Consistent With The Federal And State Statutes.

The prosecutor in *Derror* takes the position that the naturally occurring metabolite of marijuana falls within MCL 333.7212(1)(d) which provides in relevant part:

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[1] By writing the provision to apply to synthetics with similar chemical structure and/or pharmacological activity, the Legislature controls efforts to duplicate marijuana's effect, even if the mechanism of action is not precisely the same. People are infinitely creative – this provision protects against that fact. *See People v Turmon,* 417 Mich 638, 648 (1983)("we note the rapid rate at which new drugs are developed and introduced and the incredible ingenuity exhibited in the discovery of novel ways to abuse drugs.") Further, the People's assertion that this provision shows a legislative intent to include drugs on Schedule 1 even if they have no pharmacological effect fails to consider MCL 333.7211, which directs the administrator "to place a substance in schedule 1 if it finds that the substance has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision." As this Court stated soon after the Act was enacted, the legislative policy behind

> synthetic equivalents of the substances contained in the plant, or in the resinous extractives of cannabis and synthetic substances, derivatives, and their isomers with similar chemical structure or pharmacological activity, or both, such as the following, are included in schedule 1:
>
> (i) Δ1 cis or trans tetrahydrocannabinol, and their optical isomers.
>
> (ii) Δ6 cis or trans tetrahydrocannabinol, and their optical isomers.
>
> (iii) Δ3,4, cis or trans tetrahydrocannabinol, and their optical isomers.

and 333.7212(1)(e), which provides that compounds of the synthetic structures referred to in subdivision (d) are also included in Schedule 1.

The Court of Appeals correctly rejected the People's argument because the language of this statute makes clear that it applies only to synthetic versions of marijuana. Using standard grammatical rules, the term "synthetic" modifies the words "substances, derivatives and their isomers with similar chemical structure or pharmacological activity." (Just as "synthetic" modifies "equivalents of the substances contained in the plant, or in the resinous extractives of cannabis.") In so doing, the Court of Appeals joined every other court to interpret this provision, and similar provisions in other jurisdictions, has held that it covers only synthetic marijuana. *People v Campbell,* 72 Mich App 411, 412 (1976); *In re Johnny O,* 107 Cal App 4th 888, 892-893 (2003)("Cases from other jurisdictions, construing virtually identical language, have held that . . . 'tetrahydrocannabinols' must be construed as limited to synthetics. *U.S. v. McMahon* (1st Cir 1988) 861 F.2d 8, 11; *Few v. State* (Tex. Crim. App. 1979) 588 S.W.2d 578, 582; *Aycock v. State* (1978) 146 Ga.App. 489, 496; *People v. Campbell* (1976) 72 Mich.App. 411, 412"). In fact, since 1968, the identical definition has been used by the federal government to include only synthetic THC. *Hemp Indus Ass'n v Drug Enforcement Admin,* 333 F3d 1082 (9th

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the statute is apparent: the severity of the drug offense depends on the dangerousness of the drug and the potential for abuse. *Turmon, supra*, at 647.

Cir 2003) (outlining history of language identical to MCL § 333.7212 included in federal statutes and regulations).

The People ignore this unbroken line of authority from other jurisdictions, but in doing so also ignore that "[t]his Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature." *Shinholster v. Annapolis Hosp,* 471 Mich. 540 (2004). The Legislature has explicitly stated that the consistent interpretation of the plain language in MCL 333.7212 is not only important, it is required. "This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states which enact laws similar to it." MCL 333.7121. The definitions of controlled substances used in MCL 333.7212 have a broader purpose than simply criminalizing those substances in Michigan. As part of the Uniform Controlled Substances Act, these definitions are intended to provide a uniform definition of prohibited narcotics. As the drafting committee explained, "[t]o assure the continued free movement of controlled substances between States, while at the same time securing such States against drug diversion from legitimate sources, it becomes critical to approach . . . this problem at the state and local level on a uniform basis. A main objective of this Uniform Act is to continue a coordinated and codified system of drug control . . ." ((Prefatory Note for Uniform Controlled Substances Act (1990)) Thus, the Legislature intended that the courts should consider the place of this statute within the national scheme when interpreting the statute.[2] As such, it is clear that MCL 333.7212 applies only to synthetic drugs.

The People's interpretation of this provision also makes little organizational sense. According to the prosecutor, the Legislature discussed synthetic substances before "derivatives"

[2] For this reason, it is significant that the DEA does not require a license to purchase carboxy THC, even if the purchaser is in Indiana and not in Michigan.

and "isomers" and again afterwards (because all of the identified substances are synthetics), but in the middle deviated to address natural derivatives and isomers. As in literature, a word must be defined in context. Taken in context, the entire subsection can only be referring to synthetic substances.

The People next argue, somewhat curiously, that carboxy THC falls within the definition of MCL 333.7212(1)(e), a compound with a structure similar to substances prohibited by subdivision (d) – the synthetic equivalents of the drug. Specifically, the People argue that carboxy THC is a compound of THC and carboxy THC has a similar structure to the parent drug. This argument fails on its face because the parent drug is not listed in subdivision (d). Rather it is included on subdivision (c). Thus, subdivision (e) has no relevancy here.

D. The Definition Of Marijuana In MCL 333.7106 Does Not Include Carboxy THC. The Unprecedented Expansion Of This Definition, Originally Adopted By The U.S. Congress In 1937, Is Contrary To The Plain Language Of The Statute, Legislative Intent, And Renders The Statute Constitutionally Vague And Overbroad.

Echoing the arguments of the *Derror* prosecutor, in *Kurts* the prosecutor asserts that the "plain language" of MCL 333.7106(3) includes marijuana metabolites under a strained and stretched definition of the word "derivative." This argument fails on multiple fronts. First, the People are using an incorrect definition of "derivative," which is contrary to legislative intent. Second, even if the People are correctly defining "derivative," without reference to legislative intent, the statutory definition of marijuana is so narrow that it does not include all species of marijuana. Third, the People's proposed definition of derivative renders the statute unconstitutionally vague and overbroad.

MCL 333.7106 defines "marihuana," in relevant part, as including "every compound, manufacture, salt, derivative, mixture, or preparation of the plant [Cannabis sativa L] or its seeds or resin." At the *Daubert* hearing in *Derror,* prosecution expert Dr. Glinn stated that when you derivatize that "is what we do in the lab," whereas products created within the body are metabolites. (142a) She further said, "Derivative the products are not products of metabolism, they happen outside the body, we do not call them metabolites we would call them derivatives." (143a) Textbooks would describe the process of creating carboxy THC as metabolism, not derivatization. (141a) Dr. Glinn further stated that "We use derive to analogize as a chemist." (107a) Indeed, the experts agreed that metabolites are created by the body. (142a, 158a) Nonetheless, it was Dr. Glinn's position that "derivative" could be defined broadly enough to encompass a "metabolite" because the dictionary defines "derivative" as something "modified from its original state" and metabolites are modified by the body from their original state. (107a) Dr. Atasi took a similar position as the prosecution's expert in *Kurts.*

Dr. McCoy stated that metabolites are not commonly considered derivatives – derivatives are created externally, metabolites internally as a result of the metabolic process. (158a) A "classic" example of a derivative is methamphetamines, which are derivatives of amphetamines. (159a) He further explained that carboxy THC is not the only metabolite of marijuana. (161a) Carbon dioxide is another common metabolite (and hence derivative under the People's theory) of marijuana. (*Id.*)

Essentially, the prosecution argues that the Legislature intended to define derivative very broadly, so as to sweep in not just those substances commonly called derivatives by scientists but also to include metabolites created within the body. This argument strains not just the common usage of these terms, according to the testimony of the experts, it is also utterly inconsistent with the express legislative intent in the enactment of the Controlled Substance Act.[3] *See* MCL 333.7211 (Schedule 1 substances have high potential for abuse). It is also contrary to the rule of lenity, which requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v US,* 531 US 12, 25; 21 SCt 365; 148 LEd2d 221 (2000) *quoting Rewis v. United States,* 401 U.S. 808, 812, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971).

The MCL definition of marijuana in section 333.7106(3) is identical to the federal definition of the term enacted as part of the Controlled Substances Act of 1971. *See* 18 USC § 802; MCL 335.305(3), P.A. 1971, 196. The U.S. Congress adopted its definition, without change or comment, from the Marijuana Tax Act of 1937. *US v Walton,* 514 F2d 201, 203 (DC Cir 1975). The "euphoric" effects of THC are what led Congress to ban marijuana. "Looking at the legislative history of this latter law, we find that the definition of marijuana was intended to

[3] The prosecutor's argument in *Derror* at pp 27-35 is based on the legislative intent underlying the 2003 driving under the influence statute. The definition of marijuana at issue, however, is not contained in that statute. Rather, it was adopted in Michigan thirty years earlier and initially adopted seventy years earlier by the U.S. Congress.

include those parts of marijuana which contain THC and to exclude those parts which do not." *Id.* Michigan courts have long reached the same conclusion. *People v Riddle,* 65 Mich App 433, 437 (1975) ("We believe that the Controlled Substances Act of 1971 was not intended to serve as a textbook on botany and that if the Legislature believed that its definition of marihuana covered all forms of marijuana containing the hallucinogenic or euphoric chemical common in all so-called species or varieties of the plant"). As noted above, the overall purpose of the Controlled Substance Act was to control drug abuse.

While there is ample evidence that the Legislature in 1970 was concerned with the possibility that cannabis plants could be turned into something else through a voluntary process, there is utterly no evidence anywhere that the Legislature gave a moment's thought to the possibility that the metabolic process after marijuana was ingested needed to be regulated. Indeed, there is no other part of the Controlled Substance Act that regulates or criminalizes the digestion or metabolism of marijuana. The People cite to no cases anywhere where someone has been prosecuted for possessing a metabolite of marijuana, and defense research has revealed no such examples. This is a curious fact indeed for a statute that has been in existence in one form or another for decades.

Further militating against the People's interpretation of derivative to include metabolite is the fact that other states, with identical definitions of marijuana, have specifically included the word "metabolite" in their driving while impaired statutes.

Far from supporting the People's argument, they show that metabolites are not included in the Controlled Substances Act. For instance, the Arizona legislature proscribed driving a vehicle with any amount of "a drug defined in section 13-3401 or its metabolite." ARS § 28-692(A)(3). Although the People attempt to distinguish this statute on grounds that the definition

of cannabis does not include reference to its derivatives or compounds, the People are simply wrong – the definition explicitly includes derivatives and compounds. ARS 13-3401(4)("'Cannabis'" means (a) The resin extracted from any part of a plant of the genus cannabis, and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its resin. . . . (b) Every compound, manufacture, salt, derivative, mixture or preparation of such resin or tetrahydrocannabinol.") (emphasis added). Thus, the Arizona Legislature believed that derivatives and compounds of marihuana did not include the metabolite of marihuana. The Indiana Legislature also explicitly included metabolites in that state's driving while impaired statute. Ind Code § 9-30-5-5(a)(2) ("a controlled substance listed in schedule I or II of IC 35-48-2 or its metabolite in a person's blood") Like Arizona and Michigan, Indiana too has adopted the Uniform Controlled Substances Act. See MCL Ch 333 Art 7, Table of Jurisdictions Wherein the 1970, 1990 and 1994 Versions of the [Uniform Controlled Substances] Act or a Combination Thereof Have Been Adopted.

Assuming, however, for sake of argument that the Michigan Legislature meant to prohibit the use, delivery or possession of metabolized THC, the "plain language" of MCL 333.7106 only includes carboxy THC which has come from the cannibis sativa L. plant, not any of the other species of cannibis. *See* MCL 333.7106. If the prosecution's theory that this statutory definition is clear, and no reference is necessary to legislative intent is needed, then it stands to reason that the entire statutory definition must be interpreted according to its "plain language." Thus, *only* cannibis sativa L and its derivatives are illegal. The other species of marijuana plants would be legal. Therefore, in all marijuana prosecutions, including driving under the influence, the People would have to prove what species of plant was involved – a clear impossibility where the carboxy THC is in the blood. *See Riddle, supra,* at 436 ("The record shows there are currently

no methods for distinguishing Cannabis Sativa from other so-called species or varieties once the marihuana plant is chopped up. Unless the culprit is caught with the plant itself, convictions would appear unattainable, since the prosecution would be unable to present evidence specifically identifying the substance as Cannabis Sativa.")

Courts, however, have fairly consistently disagreed with the assertion that the "plain language" of MCL 333.7106(3), and its sister federal and state statutes, is so clear that it can be interpreted without reference to legislative intent. Since the 1970s, courts have consistently held that even though the plain language of the statute refers only to this species of the plant, the Legislature's intent was to include all species of marijuana.[4] *Riddle, supra*; *US v Sanapaw,* 366 F3d 492 (7th Cir 2004)(citing cases). These courts have done so based on the legislature's intent to control the euphoric effect of marijuana. Consistent with this intent, carboxy THC could not be a controlled substance.

Moreover, carboxy THC was a known structure at the time MCL 257.625(8) was adopted. *See* 110a (Dr. Glinn testifies that she developed a test for carboxy THC in blood in 2001) If the Legislature intended to include it as part of the driving while impaired statute it could have done so in the same ways the Arizona and Indiana legislatures did. It did not. And with good reason. The experts agreed that the intoxicating effects of marijuana last no more than 24 hours, but the metabolite remains in currently detectible amounts for much longer – 6 days for blood and weeks for urine. Under the prosecution's theory, a person who drove days (or even weeks) after smoking marijuana at a point when they are, under accepted medical standards, no longer impaired, could still be convicted of driving under the influence. The Legislature could

certainly have decided to the contrary. Indeed, the prosecution's interpretation renders the driving under the influence of drugs statutes constitutionally questionable since they effectively create the sort of status crime struck down by the United States Supreme Court in *Robinson v California,* 370 US 660; 82 S.Ct. 1417; 8 L.Ed.2d 758 (1962).

The People's argument that Michigan has historically tested for metabolites to determine whether someone is using marihuana is further evidence that the Legislature knew about metabolites and, unlike other states, chose not criminalize the presence of those metabolites in MCL 257.625. As for the alleged increased difficulty in prosecuting people driving under the influence, setting a zero tolerance level actually makes it easier to prosecute anyone with any amount of certain controlled substances in their body – including people using drugs other than marijuana.

Finally, the People's interpretation of the statute should be rejected because doing so would render the provision constitutionally vague and overbroad, and so a violation of due process. US Const, Ams V, XIV; Mich Const 1963, art 1, § 17. Given that the experts could not agree on the meaning of the term "derivative," a person of ordinary intelligence could not be expected to know that the metabolite of marihuana, which for the past 30 years has not been a controlled substance, had suddenly become a prohibited "derivative" of the drug and so a prohibited controlled substance. *Grayned v City of Rockford,* 408 US 104, 108; 92 SCt 2294; 33 LEd2d 222 (1972)("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *Village of Hoffman Estates v Flipside,* 455 US 489; 102 SCt 1186; 71 LEd2d 362 (1982).

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[4] Interestingly, Michigan previously did not limit its definition of marijuana to Cannabis sativa, instead stating that "Cannibis" includes "marihuana and all allied plants of the cannibis family which are habit forming." MCL 335.151, Act 266 1952. This sentence was deleted from the

Criminal statutes must be clear and definite so a person of reasonable intelligence is aware of prohibited conduct. "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits····" *Giaccio v. Pennsylvania,* 382 U.S. 399, 402-403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The need for expert testimony alone, by highly educated toxicologists who do not agree on as to whether a "derivative" necessarily includes "metabolite," shows that this term is unconstitutionally vague if read as expansively as the People propose.

For these reasons, this Court should affirm the Court of Appeals' decision.

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definition of marijuana adopted by the Michigan Legislature in 1978. MCL 333.7106(3), Act 368, 1978.

II. MCL 257.625(4), (5) AND (8) ARE NOT STRICT LIABILITY CRIMES. HOLDING OTHERWISE WOULD VIOLATE DEFENDANTS' CONSTITUTIONAL RIGHT TO DUE PROCESS

A. Standard Of Review/Issue Preservation

This Court allowed the People to add the issue of whether under MCL 257.625(4), (5) and (8), "the prosecutor must prove beyond a reasonable doubt that defendant knew the ingestion of the controlled substance may cause intoxication," and in all other respects denied the People's Application for Leave to Appeal. (278a) This statement of the issue by the Court coincides with the portion of *People v Lardie,* 452 Mich 231 (1996) that had not been addressed by this Court in *People v Schaefer*, 473 Mich 418 (2005). The People, however, have addressed the question more broadly, essentially creating two questions (1) must the People prove voluntary consumption of an intoxicating agent as required under *Lardie*, *supra,* at 251 and (2) must the People also prove that the Defendant "[k]new he or she might be intoxicated" when driving, a position rejected by this Court in *Lardie, supra* at 251 fn 31.

Defendant does not agree that either the language or the history of this statute clearly and unambiguously shows the Legislature did not intend that a scienter element apply to the act of driving under the influence. Defendant asserts that due process requires that, at a minimum, the People show an intent to consume the controlled substance, *i.e.,* that the Defendant knowingly consumed a controlled substance. Defendant further takes the position that the second issue posited, whether the People must show that when the Defendant chose to drive she knew she might be intoxicated, is beyond the scope of the grant of leave in this case. If, however, this Court nonetheless chooses to expand the issues in this case further, Defendant takes the position that due process further requires that the People show that the Defendant knew or should have known that at the time she drove she had some amount of a controlled substance in her body.

Defendant agrees with the standard of review stated by the People.

B. Strict Liability Offense Are Disfavored

"[T]o determine whether a statute imposes strict liability or requires proof of a guilty mind, the Court first searches for an explicit expression of intent in the statute itself. *People v Tombs*, 472 Mich 446, 451 (2005). Strict liability criminal statutes are not favored. *People v Quinn,* 440 Mich 178, 187 (1992).

As this Court stated in its decision last year in *Tombs, supra,* "[a]bsent some clear indication that the Legislature intended to dispense with this requirement [of *mens rea*], we presume that silence suggests the Legislature's intent not to eliminate *mens rea.*" This determination was based on a line of U.S. Supreme Court precedent starting with *Morissette v United States,* 342 US 246; 72 S.Ct. 240; 96 L.Ed. 288 (1952). *Tombs, supra,* at 452-457. In *Morissette, supra,* the Supreme Court dealt with a situation, similar to that in the case at bar, of whether a mens rea element of criminal intent should be inferred into a statute in the absence of express language within the statute requiring a finding of intent. In *Morissette,* the defendant was convicted of converting government property to his personal use after he took what he believed to be abandoned property (spent shell casings) from a bombing range and sold them for salvage. The defendant was convicted, despite his statements that he had no intent to steal anything but thought the property abandoned as scrap by the government, when the trial judge instructed the jury that a lack of intent to steal was not a defense to the charge.

In evaluating the statute at issue, the Supreme Court in *Morissette* relied upon a long-standing presumption that all crimes carry with them a requirement that the criminal act be an intentional violation of the law:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in

> mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

343 US at 250-251.

The *Morissette* Court did note that a certain subset of offenses have premised criminal liability without the need for the prosecution to show a criminal intent or mens rea, but only where the offense at issue is a crime against the public welfare, such as regulatory offenses. The Court noted that the variety of crimes against public welfare that do not contain the presumption of a criminal intent commonly are punished by a relatively small amount of incarceration or fine, and a conviction under these statutes "does no grave damage to an offender's reputation." *Id.* at 256.

Turning to the larceny statute before them, the Court in *Morissette* ruled that Congress, being well aware of the presumption that crimes contain an intent element, does not signal a desire to preclude a need to prove intent merely by failing to expressly place an intent element into the language of a statute:

> Congress, therefore, omitted any express prescription of criminal intent from the enactment before us in the light of an unbroken course of judicial decision in all constituent states of the Union holding intent inherent in this class of offense, even when not expressed in a statute. Congressional silence as to mental elements in an Act merely adopting into statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.
>
> * * *
>
> The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit

> as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative.
>
> The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.
>
> We hold that mere omission from sec 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced.

343 US at 261-263.

In *Staples v United States*, 511 US 600 (1994), Justice Thomas, writing for the majority, relied upon the *Morissette* presumption of a requirement of criminal intent to hold that a federal statute making it a crime to possess an unregistered weapon capable of automatic firing requires the prosecution to prove beyond a reasonable doubt the accused knew of the weapon's ability to fire automatically, despite the lack of any language in the statute concerning knowledge or intent. Noting that interpretation of a statute to determine if a criminal intent is necessary for conviction requires consideration of the goals of the legislation, the Court noted that "silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that that defendant know the facts that make his conduct illegal." 511 US at 605. Citing *United States v United States Gypsum Co.,* 438 US 422, 436 (1978), Justice Thomas wrote "'the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" *Id.* at 605. The Court concluded, based on *Morissette* and *United States Gypsum Co.,* that offenses that do not require a

mens rea element are disfavored, and will not be found in the absence of some express or implied indication of Congressional intent to dispense with an intent element.

The Court in *Staples* went on to find the firearm statute at issue was not an offense dealing with the public welfare, and thus did not fall within that narrow exception to the presumption favoring a *mens rea* element. The Court noted that to accept the government's position that strict liability should be imposed on anyone in possession of the type of banned weapon "would impose criminal sanctions on a class of persons whose mental state – ignorance of the characteristics of weapons in their possession – makes their actions entirely innocent." 511 US at 614-615. See also *Liparota v United States,* 471 US 419; 105 S Ct 2084; 85 L Ed 2d 434 (1985). The Court wrote:

> We concur in the Fifth Circuit's conclusion on this point: "It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment if ... what they genuinely and reasonably believed was a conventional semi-automatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon."

511 US at 615.

The Court further held the serious nature of the punishment for this offense – a possible ten years in prison – was "a significant consideration in determining whether the statute should be construed as dispensing with *mens rea.* * * * In a system that generally requires a `vicious will' to establish a crime, 4 W. Blackstone, Commentaries 21, imposing severe punishments for offenses that require no *mens rea* would seem incongruous." 511 US at 616.

The rulings from *Morissette , Liparota,* and *Staples* were later applied in *United States v X-Citement Video,* 513 US 64; 115 S Ct 464; 130 L Ed 2d 372 (1994). The statute in that case mades it illegal to "knowingly transport or ship" in interstate commerce or "knowingly receives, or distributes" any "visual depiction" if that depiction "involves the use of a minor engaging in

sexually explicit conduct." 18 USC sec 2252. The precise issue presented to the Court was whether the term "knowingly" as used in the subsection also modified the phrase "use of a minor" in the remainder of the statute. In essence, the issue was whether the prosecution must prove, in a trial under this statute, that the accused both knowingly transported or distributed the material and knew the material depicted a minor engaged in the forbidden sexual activity.

Applying the presumption of a *mens rea* element in the absence of clear congressional intent that strict liability be imposed, the Court, per Chief Justice Rehnquist, held an element of requiring the defendant to know the nature of the material must be imputed into the statute. The Court held this interpretation of the statute was necessary "as to avoid substantial constitutional questions." 513 US at 68. The Court wrote they could not presume that Congress intended to punish persons for transporting or distributing material without knowledge of the nature of that material:

> If the term "knowingly" applies only to the relevant verbs in sec 2252 – transporting, shipping, receiving, distributing, and reproducing – we would have to conclude that Congress wished to distinguish between someone who knowingly transported a particular package of film whose contents were unknown to him, and someone who unknowingly transported that package. It would seem odd, to say the least, that Congress distinguished between someone who inadvertently dropped an item into the mail without realizing it, and someone who consciously placed the same item in the mail, but was nonetheless unconcerned about whether the person had any knowledge of the prohibited contents of the package.
>
> Some applications of respondents' position would produce results that were not merely odd, but positively absurd. If we were to conclude that "knowingly" only modifies the relevant verbs in sec 2252, we would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material.

513 US at 69.

The *X-Citement Video* Court held the federal statute at issue was not a public welfare offense which would be exempted from the presumption in favor of a *mens rea* element as to the

subject matter of the material. Chief Justice Rehnquist wrote "Rather, the statute is more akin to the common-law offenses against the 'state, the person, property, or public morals,'" citing to *Morissette.* 513 US at 71. He added: "*Morissette,* reinforced by *Staples,* instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." 513 US at 72.

Finally, reviewing the legislative history of this statute, the *X-Citement Video* majority found no express intent of Congress to apply strict liability to the issue of whether the accused knew of the illegal nature of the material. 513 US at 73-78.

C. MCL 257.625 Includes A Scienter Element

Applying *Tombs* and United States Supreme Court precedent here, this Court should hold, as did the court in *Lardie,* 452, Mich 231(1996), that MCL 257.625(4) – as well as 257.625(5) and 257.625(8) contain a *mens rea* element. First, as in *Tombs*, the dictionary definition of "operate" implies that the person driving the car with the controlled substance in their system is performing a knowing and intentional act. The common definition of "operate" is:

1 : BRING ABOUT, EFFECT

2 a : to cause to function : WORK b : to put or keep in operation

3 : to perform an operation on; especially : to perform surgery on

Merriam-Webster OnLine Dictionary <http://www.m-w.com> (accessed December 26, 2005) As this Court explained in *Tombs*, the use of active verbs "supports the presumption that the Legislature intended that the prosecution prove that an accused performed the prohibited act with criminal intent."

A holding that the prosecution must prove that a defendant intended to drive after knowingly consuming a controlled substance also supports the goal of the Legislature of increasing the criminal penalties associated with driving while intoxicated. *Schaefer*, *supra*, at 427. There are no scientific studies clearly establishing a level of impairment, as there are with alcohol. The Legislature, therefore, set the presumptive level for impairment at zero. The People cite absolutely no support from legislative history, nor could they, that the reason the level was set at zero was to allow for the criminal punishment of people who had not voluntarily consumed a controlled substance. *See* 75b-90b. (The People's argument that the Legislature instead decided to create an implied affirmative defense of involuntary consumption is, in fact, incongruous with this assertion.)

Imposing a minimal *mens rea* requirement also protects those people who innocently or accidentally ingests an intoxicating substance and then drives. Although the People scoff at the possibility of involuntary ingestion, marijuana could be innocently consumed much more easily than alcohol, and with the statutory level set at "any amount" could accidentally violate the statute; for instance, someone who is in a room – or at a concert – with people who are, or were, smoking marijuana through second-hand smoke. *See* Appellant's Appendix in *Kurts* at 63a. Similarly, someone could inadvertently eat a "pot brownie" believing it to be a brownie of the more conventional sort. *See id.* More to the point, date rape drugs are also Schedule 1 drugs – for which the entire point is that they are involuntarily and unknowingly consumed. *See* MCL 333.7214(f). A woman who had been slipped some GHB could be prosecuting for driving herself to the hospital after she discovered she had been raped if any of the GHB remained in her body.[5] If the statute contained no *mens rea* element, a person lacking any criminal intent – other

[5] The record is silent on the question of how long GHB remains in the body after ingestion.

than the intent to drive – could be convicted and imprisoned for up to 20 years in prison if an emergency worker is killed as a result. *See* MCL 257.625(4).

Assuming for sake of argument that this Court accepts the People's position that carboxy THC is a controlled substance, the potential for innocent people being brought within the ambit of MCL 257.625 is even greater if the mens reas element is eliminated. Imagine that on Monday, Martin eats a brownie that his son Stan left in the refrigerator. Unbeknownst to Martin, Stan has laced that brownie with marijuana. On Thursday, long after the effects of the brownie have worn off, Martin drives his car and is involved in a accident that seriously injures both Martin and his son Stan. The blood tests reveal that Martin has carboxy THC in his system, and he can be prosecuted under MCL 257.625(5). Under the prosecution's argument, the fact that Martin involuntarily ingested the marijuana is of no moment. (Under *Schaefer,* Martin's argument that his alleged "impairment" could not have had any effect on the accident because according to accepted scientific evidence he was not impaired, would be irrelevant as a matter of law.)

In addition, interpreting the statute in the manner the prosecution would render MCL 257.625 unconstitutional. As this Court stated in *Lardie,* "this crime does not fit the definition of a public-welfare, strict-liability offense." *Lardie, supra*, at 253. As the *Lardie* Court explained, public welfare statutes protect the public by placing the burden of protecting society on a person "'otherwise innocent but standing in responsible relation to public danger.'" *Lardie, supra* at 254, quoting *Quinn, supra,* at 187. In contrast, the Court stated, MCL 257.625(4) seeks not to regulate the conduct of someone who is otherwise innocent (particularly someone consuming an illegal controlled substance), but "punishes a person's gravely irresponsible act of operating a

vehicle while intoxicated when that act causes another person's death." *Lardie*, *supra* at 255. The same holds true for the lesser crimes prohibited by MCL 257.625(5) and (8).

Second, the penalties imposed here for the violations of these statutes are not consistent with the "relatively small" penalties which "do no 'grave damage to an offender's reputation'" consistent with strict liability public welfare offenses. *Lardie, supra*, at 255 quoting *Staples, supra*, at 617-618. MCL 257.625(4) and (5), which are premised on violations of MCL 257.625(8), are significant felonies, the violation of which can subject a Defendant to up to 20 years in prison in certain circumstances. Even MCL 257.625(8) which is a misdemeanor for a first time offense becomes a felony if a person has driven under the influence of either alcohol or a controlled substance more than twice. MCL 257.625(9). All carry a social stigma which do "grave damage" to the reputation of anyone convicted of such an offense.

The Prosecutor's argument that voluntariness of the consumption of the controlled substance should be an affirmative defense cannot solve the due process problem of creating a strict liability offense. First, if there is no intent requirement in the statute, then the voluntariness of the consumption is irrelevant, even as a defense, since there is no intent to negate. Second, the prosecution's interpretation of MCL 257.625 fails the second prong of the test established in *People v Pegenau,* 447 Mich 278 (1994), namely whether the state could constitutionally punish the defendant on the basis of proof of only those elements on which the prosecution retains the burden of proof. As discussed above, the statute violates principles of constitutional due process if it does not include a scienter element.

Thus, principles of statutory interpretation and due process require that, at a minimum, the Prosecutor be required to prove that the Defendant voluntarily consumed a controlled substance, or as this Court stated in *Lardie,* that the Defendant knew "he had consumed [a

controlled substance] and might be intoxicated," *i.e.,* still had any amount of that controlled substance in his body.

In addition, the People also devote a significant portion of their brief to an additional issue, whether or not the prosecutor has to prove that a defendant "[knew] that he or she might be intoxicated" when they drove. (Appellant's Brief at 38-42) In *Lardie,* this Court explained, "we read the statute to prohibit a defendant from claiming that he had consumed an intoxicating liquor or a controlled substance but did not think he was intoxicated." *Lardie*, *supra* at 251 n 31. Given that this Court in *Schaefer* did not explicitly call this part of *Lardie* in question, the People's argument is puzzling and appears to be aimed at knocking down a straw man. It is also beyond the scope of the issue this Court permitted the People to add. Since it has not been addressed by the courts below, or permitted by this Court, Defendant's position is that this argument is not currently ripe for review.

If, however, this Court chooses to address this additional issue, Defendant takes the position that the due process clauses of the U.S. and Michigan constitutions require that the People also prove that at the time the Defendant drove she knew there might be some amount of a controlled substance in her body. US Const Ams V, XIV; Mich Const 1963 art 1 § 17. As discussed above, the marijuana metabolite carboxy THC remains in a person's body long after any impairment caused by the intoxicating effects of marijuana. In other words, a person could drive days after ingesting marijuana and, under the People's theory, still be guilty of driving under the influence of drugs. Because there is no requirement under MCL 257.625 that the alleged impairment be a proximate cause of any resulting accident, the fact that the person was not, in fact, impaired at the time they drove would not be a legal defense. Just as the language of the statute, the intent to only punish impaired drivers, and the potential for "innocent" people to

be convicted of a significant felony all support a conclusion that the People must prove intentional consumption of a controlled substance, they also support a conclusion that the People must also prove an intent to drive while under the influence. The proof problems the People suggest exist only if this intent must be subjective; an objective standard, however, would eliminate these difficulties.

For the foregoing reasons, this Court should hold that MCL 257.625(4), (5) and (8) include a scienter requirement.

SUMMARY AND RELIEF SOUGHT

Defendant-Appellee asks this Honorable Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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BY: _____

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